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In The

Supreme Court of the United States

OCTOBER TERM, 1984

JOHN DI GILIO,

Petitioner,

-vs-

STATE OF NEW JERSEY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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EDITOR'S NOTE

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QUESTIONS PRESENTED

1. Whether misinstruction of a grand jury as to the law in a fashion which misleads the grand jury into the view that wholly lawful conduct is illegal requires dismissal of the indictment and re-presentation of the evidence under a correct legal analysis?

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IN THE
SUPERIOR COURT OF THE UNITED STATES
OCTOBER TERM, 1984

JOHN DIGILIO, Petitioner

-vs-

STATE OF NEW JERSEY

PETITION FOR A WRIT OF CERTIORARI
TO THE NEW JERSEY SUPREME COURT

Petitioner prays that a writ of certiorari issue to review the judgment of the New Jersey Supreme Court entered in this proceeding on October 16, 1984.

OPINION BELOW

The Judgment Order of the New Jersey Supreme Court and letter-opinion of the trial ourt are appended to this Petition.

JURISDICTION

The jurisdiction of the Supreme Court to review the Final Judgment of the New Jersey Supreme Court is based on **28 U.S.C. Sec. 1257.**

CONSTITUTIONAL, STATUTORY AND RULE PROVISIONS INVOLVED

Petitioner seeks review of issues of law arising under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

ORDER EXTENDING TIME TO FILE PETITION FOR CERTIORARI

An application was made to Associate Justice William Brennan, Jr. seeking an extension of time within which petitioner could timely file the within petition for certiorari. Justice Brennan issued an order extending the time until January 5, 1985.

STATEMENT OF THE CASE

I.

Introduction

The instant case presents an important issue which has not been resolved by the State courts of New Jersey nor this Court. Resolution of the issue is critical to the growth and development of the grand jury process in jurisdictions where this procedure is employed to determine probable cause. Specifically, the issue presented herein is whether a prosecutor's misinstruction of a grand jury as to the law requires

dismissal of an indictment in circumstances where the incorrect instructions clearly misled the grand jury into the belief that wholly lawful conduct was criminal.

Abuse of the grand jury by virtue of misinstructions as to the law essentially renders the grand jury process a nullity. Guidelines for review of such misinstructions must be fashioned as well as a fair remedy for any prejudice which stems therefrom. The remedy of a new trial, in cases where the misinstruction is repeated before the trial jury, is wholly insufficient to preserve the soundness of the grand jury process. The grand jury and indictment process is the seed of a prosecution in most jurisdictions. A poisoned seed can only bear poisoned fruit. Modification of the indictment by a Court is also an insufficient and impermissible remedy. The substantive form of an indictment is a grand jury function exclusively.

Petitioner was indicted pursuant to New Jersey State statutes for alleged entry into a conspiratorial agreement with a government undercover operative. The grand jury was misinstructed that an agreement to commit an offense with an undercover police officer constituted a crime within **Title 2A.** See, **State v.**

Mazur, 158 N.J. Super. 89 (App. div. 1978), certif. den. 78 N.J. 399 (1978). Petitioner raised the grand jury misinstruction issue as part of a motion to dismiss the indictment. Notwithstanding clear evidence of misinstruction of the grand jury, which is bolstered by the concession of the State that it relied upon incorrect law, the State courts refused to remedy this infringement of the absolute right to an independent grand jury assessment of probable cause.

Serious error or misconduct in the grand jury process in our view has greater significance than errors or omissions which occur at trial. A defendant and/or his counsel are present at every stage of trial and may act swiftly to rectify misconduct or omission. The prosecutor is alone with the grand jury when the grand jurors are educated as to the law. The prosecutor, therefore, has great leverage. That leverage was enhanced at the time of the instant indictment because the prosecutor's manipulation of legal principles was not transcribed. The exclusive means to judge the grand jurors' assessment of the law is by virtue of an examination of the face of the indictment. The grand jurors' misapprehension as to the law is clearly manifested by the decision to name the undercover

police operative as a co-conspirator in circumstances where the law precluded such a finding. And, more importantly, the State conceded that the grand jury was misinstructed.

Avoidance of an ill-founded indictment is the primary interest of any individual whose conduct is under review by a grand jury. And, all citizens are entitled to absolute fairness in this process. Petitioner was denied his right to indictment because the State advised the grand jury that wholly lawful conduct was criminal. That body might well have declined to indict petitioner had it been correctly instructed. This Court must dismiss the instant indictment and order the State to re-present its evidence to the grand jury under a correct assessment of applicable legal principles. Justice demands no less.

a. Procedural Background

On March 1. 1978 State Grand Jury Indictment No. SGJ43-77-3 was filed. That indictment charged petitioner John DiGilio, Anthony Pacilio and Neil Pacilio with conspiring together with Robert Weisert to engage in the business of making usurious loans in violation of N.J.S.A. 2A:119A-3. Trial

commenced on May 18, 1981 before the Honorable Jacques H. Gascoyne, J.S.C. and a jury. Petitioner, due to a continuing health problem, was ruled physically unfit to participate in the trial. Thus, only Anthony and Neil Pacilio were tried. On June 24, 1981, following an 18-day trial, Anthony Pacilio was found guilty of conspiracy. (T18.14-11 to 14). Codefendant Neil Pacilio was acquitted. (T18-14-17 to 21). Thereafter, the conviction of Anthony Pacilio was reversed by the Appellate Division on July 13, 1983.

On March 25, 1983, petitioner moved before the Honorable Donald G. Collester, J.J.D.R.C. t/a for an order dismissing the indictment. On November 7, 1983 Judge Collester denied petitioner's motion. Thereafter, petitioner moved for reconsideration of Judge Collester's decision. On February 21, 1984, Judge Collester denied petitioner's motion for reconsideration. Thereafter, the Appellate Division and Supreme Court of New Jersey denied petitioner's Motions for Leave to Appeal. This petition follows.

b. Factual Background

i.

The Indictment

The indictment charges that petitioner and others conspired with an undercover police operative. Specifically, the indictment alleges that Anthony Pacilio, petitioner, Neil Pacilio "and Robert Weisert, a detective in the New Jersey State Police acting in an undercover capacity and using the name Bobby Hesse...knowingly, willfully and unlawfully did conspire..." Weisert was named as a conspirator in the indictment because the grand jury was misinstructed by the prosecutor that he could legally be a party to the alleged conspiracy.

ii.

The Facts As Adduced At The Pacilio Trial

Weisert has been employed by the New Jersey State Police for approximately ten years. (T3.21-7 to 13). During 1977, Weisert "was employed as an undercover detective at a company called Alamo Transportation." (T3.21-17 to 18). The government surreptitiously purchased an interest in the company in order to create a front for an investigation. The premises of the company were equipped with sophisticated eavesdropping devices designed to record conversations occurring at any pre-arranged meeting.

Utilizing the fictitious name "Robert Hesse," Weisert in his undercover capacity pretended to function as the bookkeeper of the company. Anthony Pacilio had an ownership interest in Alamo Transportation. Anthony Pacilio was unaware that his business associates were undercover police operative and made no effort to involve those individuals in crime. Contrarily, Weisert set out to tempt Pacilio into crime.

Weisert testified that discussions commenced on July 5, 1977 wherein he instigated a conversation with Anthony Pacilio concerning initiation of "a loan shark operation." The conversation was taped. The discussions centered upon Weisert's ability to finance the operation. Anthony Pacilio's participation was to be limited to supplying clients. Anthony Pacilio was completely insolvent and unable to consider any such endeavor, absent financing of it by Weisert. In an attempt to fabricate an opportunity for Pacilio to contribute value to creation of the operation, Weisert stated that "permission" from petitioner to conduct the business would be a sufficient contribution by Pacilio.

Weisert continually pressed Anthony Pacilio to arrange a meeting with petitioner. Pacilio knew full well that petitioner had no power to license a

loansharking enterprise nor any interest in it. Due to faulty intelligence information, petitioner was a prime target of the investigation and Weisert was zealously interested in constructing a scenario wherein it would appear that petitioner had an interest in the scheme. The loansharking operation which was instigated by Weisert was to be fully capitalized by Weisert's provision to Anthony Pacilio of $5,000.

Discussions involving only Weisert and Anthony Pacilio continued on July 7, 1977. Weisert sought out Anthony Pacilio to instigate further conversations concerning criminal activity. Weisert inquired whether Anthony Pacilio remained interested in the "shylock operation." Pacilio replied that such an operation would commence immediately upon the extension of financing by Weisert. Pacilio was destitute and would make any representation in order to gain access to Weisert's money.

On August 2, 1977 Anthony Pacilio introduced Weisert to Neil Pacilio at Alamo Trucking. Oddly, the conversation was not recorded despite the fact that the meeting was pre-arranged. Weisert testified that Neil Pacilio "thought it would be a good idea and since [Anthony] had the clients he saw no problems in

establishing the business." Weisert further stated "[Neil Pacilio] told us that we had his okay." Weisert testified that he told Neil Pacilio that he would provide the money on or about August 22. The jury at trial disbelieved Weisert's account of his conversations and acquitted Neil Pacilio.

On August 3, 1977 the private discussions of Weisert and Anthony Pacilio continued. Anthony Pacilio told Weisert that when Alamo Transportation closed, he (Weisert) "would be working with Neil Pacilio and Anthony Pacilio." Thereafter, conversations continued between Anthony Pacilio and Weisert on August 15, August 18 and August 25, 1977 respecting the operation. In the August 25, 1977 conversation, Weisert stated that he had not as yet secured the $5,000 needed to finance the venture. The following day, Anthony Pacilio informed Weisert that he (Weisert) was "now with the...Pacilio group." The jury verdict acquitting Neil Pacilio indicates that the Pacilio group consisted only of Weisert and Anthony Pacilio, if at all.

On August 30, 1977 Weisert and Anthony Pacilio again met to discuss the operation. Weisert continued to press Anthony Pacilio for a meeting with petitioner. Weisert indicated that he would not provide the money

unless Anthony Pacilio was able to stage such a meeting. In his desperation to secure Weisert's money, Anthony Pacilio stated to Weisert that he had managed to arrange a meeting with petitioner.

On September 6, 1977 Weisert was introduced to petitioner by Pacilio. The meeting was to be carefully structured by Pacilio, who knew that petitioner had no interest in the scheme. Prior to the meeting, Pacilio told Weisert that he was not to discuss loansharking with petitioner. Weisert was equipped with a recording device, which was attached to his body. A portion of Weisert's conversation with petitioner was recorded and played at the prior trial. Weisert claimed that the conversation was not recorded in its entirety because the recording device malfunctioned. The recorded portions of the conversation were in no sense inculpatory. Weisert testified as to the alleged substance of the unrecorded portions of the conversation. He stated:

> DiGilio told me I should stay close to [Anthony]...where we could earn some money properly...I told Mr. DiGilio that from now on I would be with [Anthony] and when I told this to him, he said that if I cared to be.

On September 7, 1977 Weisert again met with Anthony Pacilio. Weisert subsequently gave Pacilio $40 to finance an extension of credit. The following day, Weisert supplemented that amount with an additional $2,460. Weisert had further discussions exclusively with Anthony Pacilio on September 12, September 14, September 15, September 16, September 18, September 20, September 21, September 23, September 26 and September 28. Subsequent to the conversation on September 28, the undercover operation ended and Pacilio was placed under arrest.

REASONS FOR GRANTING THE WRIT

CERTIORARI MUST BE GRANTED TO PERMIT THIS COURT TO ESTABLISH A RULE OF LAW RESPECTING REMEDY OF A PROSECUTOR'S MISINSTRUCTION OF THE GRAND JURY AS TO CONTROLLING PRINCIPLES OF LAW IN A FASHION WHICH MISLEADS THE GRAND JURORS INTO THE BELIEF THAT WHOLLY LAWFUL CONDUCT IS CRIMINAL.

The issue presented to this Court is the appropriate remedy where a clearly misinstructed grand jury has returned an indictment. Specifically, the grand jury herein was misinstructed that title 2A mandated indictment of petitioner upon a **prima facie** showing that he entered into an agreement with Weisert to commit a crime. Weisert was at all times acting in the capacity of an undercover police operative and had no intent to commit any crime. See **State v. Porro, 153 N.J. Super. 179, 184 (App. Div. 1977); State v. Wilson, 183 N.J. Super. 86, 94 (Law Div. 1981).** It is conceded by all parties that this instruction was incorrect and misstated applicable law. When this matter was presented to the grand jury, it was the law in New Jersey that an individual could not legally conspire with an undercover police operative, who merely feigned agreement. See **State v. Mazur, 158 N.J. Super. 89**

(App. Div. 1978), certif.den. 78 N.J. 399 (1978). On the basis of the prosecutor's misinstructions as to the law, the grand jury returned an indictment charging that petitioner conspired with the undercover police operative. The indictment to that extent does not charge an offense. It cannot now be determined whether the grand jury would have returned any indictment had it been informed that neither petitioner nor Anthony or Neil Pacilio could legally be charged with entering into a conspiratorial agreement with Weisert.

The indictment is palpably defective and as a matter of law must be dismissed. The State courts erred in denying petitioner's motions for dismissal on this ground. See State v. Ferrante, 111 N.J. Super. 299, 304 (App. Div. 1970). The error of the State stems from the absence of any statement of law within New Jersey jurisprudence respecting the proper analysis and remedy for misinstruction of a grand jury. This Court must act to ensure that both State and federal courts are provided an analytical framework for review of this issue. A proper analysis below would have resulted in dismissal of the indictment. Courts must effectuate the absolute right to a grand jury finding of probable

cause. The grand jury is interposed between a putative defendant and the State. It has a duty to guard against unsupported indictments. A court may not negage that function by resort to wholesale substantive modification of an indictment. Such a modification, like a prosecutor's misinstructions, precludes a grand jury from serving its time-honored function. Stated somewhat differently, just as a court may not dismiss an indictment supported by adequate evidence on the ground that it disputes the quality of the evidence, it may not sustain an indictment which is predicated upon a well-defined misinstruction which led the grand jury to believe that wholly lawful conduct was criminal.

i.

The Trial Court's Opinion

The lower court's first opinion was rendered in this matter on November 7, 1983, eight months after petitioner filed his motion to dismiss. The Court was awaiting a decision in **State v. Anthony Pacilio, Docket No. A-15-05-81T4.** The Appellate Division reversed Anthony Pacilio's conviction. That Court did not address the grand jury misinstruction issue. It reversed due to repetition of the misinstruction to the petit jury. In denying petitioner's motion, the trial court stated:

> [Petitioner] argues based upon **Mazur** and **Pacilio** that the indictment in the present case is fatally defective and must be dismissed...I do not agree...The Appellate Division in Pacilio did not dismiss the indictment but rather reversed the conviction and remanded the case back for a new trial. At no point is the conclusion reached that the indictment is fatally defective. Rather, the interpretation I draw from Pacilio is that with proper instructions, the indictment could be submitted to a petit jury.

In its consideration of this issue, the trial court did not perceive that the issue as to grand jury misinstruction was not before the **Pacilio** Court. Accordingly, we sought a rehearing because the trial court erred in its reading of the **Pacilio** opinion. The trial court had also failed to offer any guidance of its own as to resolution of the grand jury misinstruction issue. In denying our motion for a rehearing, the trial court stated:

> The argument that the Grand Jury may have been instructed (incorrectly) with regard to whether or not there could be conspiracy with an undercover police officer to any mind misses the mark...Regardless as to the principle of law which could be considered - which was governing at that time - I find that defendants are not prejudiced, that their cases can be fairly heard by a jury upon proper instructions...

Thus, the trial court ruled that a criminal defendant has no right to a correctly instructed grand jury.

ii.

The Constitutional Right To Indictment

The purpose of an indictment is to provide the defendant with notice of charges against him in order that he may prepare a defense, to effectuate the Fifth Amendment's double jeopardy provision and to shield an accused from unwarranted and unfounded charges of involvement in serious crimes by interposing the independent judgment of the grand jury. **United States v. Radowitz, 507 F.2d 109 (3 Cir. 1974); State v. Wein, 80 N.J. 491, 497 (1979).** No man may be brought to trial for crime unless a grand jury shall first find sufficient cause for a charge. And, the indictment must allege all essential facts of the crime. **State v. LaFera, 35 N.J. 75 (1961);** See, **State v. Senno, 79 N.J. 216, 233 (1979); State v. Dorsey, 65 N.J. 428, 434 (1974); Stae v. Macuk, 57 N.J. 1, 8 (1970); State v. Ownes, 54 N.J. 153, 161 (1969), cert. den. 396 U.S. 1021 (1969); In re Buehrer, 50 N.J. 501, 512 (1967).** Simply put, it is the duty of the grand jury to determine whether a crime has been committed. **State v. Reynolds, 166 N.J. SUper. 570, 575 (Law div. 1979); State v. Price, 108 N.J. SUper. 272,**

276-2777 (Law Div. 1979). Further, it should be emphasized that an indictment is not amendable by a court to charge an offense not found by the grand jury, either by substitution of offenses or to supply substantive omissions. State v. Grothman, 13 N.J. 90, 95 (1953).

In State v. Wein, supra at 501, the New Jersey Supreme Court emphasized that "a person criminally accused is entitled...to be charged with crime only by a grand jury." In Wein, in a concurring opinion, Justice Pashman stated that "no doubt [should] exist...as to...whether the grand jury found probable cause as to each...offense [in the indictment]." 80 N.J. supra at 502. See State v. Wagner, 180 N.J. Super. 565, 568 (App. Div. 1981); State v. Lawrence, 142 N.J. Super. 208, 215 (App. Div. 1976). Similarly, in State v. Wolden, 153 N.J. Super. 57, 60 (App. Div. 1977), the Court stated that a defendant may not be tried "on proof of a different offense from that charged and purported to have occurred by the State's indictment and proffer of proof [to the grand jury]."

iii.

Conspiracy Law Under 2A

The gist of the crime of conspiracy under Title 2A is an unlawful agreement between two or more persons. State v. Furey, 128 N.J. Super. 12, 23 (App. Div. 1974). The crime of conspiracy requires an actual agreement to commit the substantive crime. State v. Madden, 61 N.J. 377, 394 (1972) (emphasis added). Even where the object of the conspiracy is unattainable, the fact that parties agreed to commit a crime renders them subject to prosecution for conspiracy. State v. Mazur, 158 N.J. Super. 89, 99 (App. Div. 1978). It is not necessary that there be direct contact between all the parties to the conspiracy, nor need they all enter into it at one time. It is not even required that members of a conspiracy have even heard of each other. State v. Louf, 126 N.J. SUper. 321, 339 (App. div. 1973), aff'd in part and rev'd in part 64 N.J. 1782 (1973). The commission of an overt act is an essential element of the crime of conspiracy under Title 2A and an integral part of a conspiracy indictment. State v. Wein, supra. The overt act required to establish liability must represent a substantive element of the crime and is not a mere evidential requirement. State v Newell, 152 N.J. Super. 460 (App. Div. 1977).

The Opinion In State v. Mazur

In **State v. Mazur, supra,** the Appellate Division considered whether an individual may properly be convicted of conspiracy with an undercover police operative. In **Mazur,** the court failed to instruct the petit jury that it could not find the defendant guilty under **Title 2A** of conspiring with an undercover police operative. The **Mazur** Court stated that such a failure was plain error and established the appropriate remedy as reversal of the conviction. In **Mazur,** as part of its instructions to the jury, the court read the substance of an indictment which was structured in the same fashion as that in the instant case. **158 N.J. Super. at 94.** The defendant in **Mazur** did not challenge the misinstructions provided to the grand jury and sought no pre-trial relief. Accordingly, that defendant was tried on the basis of an indictment which was founded upon the legal misconception that the law of conspiracy encompassed imaginery agreements with undercover police. Just as in the instant case, the indictment in **Mazur** stated that the defendants and an undercover opertive conspired to commit a **Title 2A** crime. **Id.** Thus, the grand jury therein clearly was misinstructed as to the law. The trial court's instructions, issued to

the petit jury subsequent to the reading of the indictment, consistent with the misinstruction of the grand jury, stated "the State must only prove that the defendant conspired with someone else to commit that crime." Id. The defendant in Mazur also failed to object at trial to the charge given to the petit jury. id. On appeal, the defendant therein challenged the instruction on the ground that "the...misinstructions permitted the jury to find [him] guilty of conspiracy if it found that [he] agreed with [the undercover operative] to commit the substantive offense." Id. The Mazur Court framed the issue as:

> whether defendant could be found guilty of conspiracy with [the undercover operative] who was a government agent at the time and thus never formed an intent on his part to enter a conspiratorial relationship and never agreed on his part to embark on a criminal enterprise." [158 N.J. Super. supra at 96]

The Court in Mazur ruled that "in New Jersey one may not be convicted of conspiracy where the co-conspirator is a police agent who never intended to enter into a criminal agreement." 158 N.J. Suer. supra at 97.

In concluding that the error mandated reversal of the conviction, the **Mazur** Court focused upon whether there existed a possibility that the jury believed that it could convict the defendant upon a finding that he conspired with the undercover operative. The Court stated:

> While it is true that the jury might have held defendant guilty of conspiracy with Nicastro alone, it is impossible to know whether the conspiracy conviction was, in fact, so founded. The point is that under the court's charge the jury could have found that he conspired with [the agent] alone. Further, the great preponderance of the evidence adduced below relates exclusively to conversations between Cohn and defendant. Thus, it seems quite likely that the jury found that defendant conspired with Cohn. [158 N.J. Super. supra at 102]

Having found that the instruction permitted a finding of guilt of conspiracy with the agent, the court ruled it to be plain error "since the court's charge would permit defendant's conviction with a person with whom he could not, under our present statutes and governing decisions, be cnvicted." 158 N.J. Super. supra at 102-103. Cf. Sears v. United States, 343 F.2d 139, 142 (5 Cir. 1965).

v.

The Misinstructions To The Grand Jury Upon Which The Indictment Is Based Are Violative Of Due Process And Mandate Dismissal Of The Indictment.

Title 2A required that any finding as to the existence of a conspiracy be based upon a demonstration of a "shared objective" among all the alleged conspirators. **State v. Mazur, supra at 99.** That rule of law precluded indictment or conviction on the basis that an individual conspired with an undercover police operative, who merely feigned an agreement. **Id. at 101.** In the instant case, the grand jury was misinstructed as to the law and led to believe that it was required to indict petitioner if it found that he agreed with Weisert to commit a crime. That misinstruction, in effect, required that the grand jury indict petitioner for wholly innocent conduct.

In **State v. Newell, 152 N.J. Super. 461, 464** (App. Div. 1977), the Appellate Division considered an indictment which did not allege sufficient facts to indicate that the grand jury was properly informed as to all of the elements of the offense. In this case, the indictment alleges sufficient facts to indicate that the grand jury was clearly misled into charging a non-offense, viz. a conspiracy with Weisert. The **Newell**

Court stated that an indictment must allege all the essential fcts of the crime charged. Id. at 466. And, the omission of an essential element cannot be supplied by inference or implication, or left to intendment. Id. The State argued in Newell that the conspiracy count could be coupled with a substantive count for analytical purposes as part of the determination as to whether the grand jury found all of the elements of the conspiracy. The Newell Court disagreed stating that an accusation may not "be in part made by the court, and in part by the grand jury." Id. at 467. An indictment must be exclusively returned by the grand jury. Id.

In the instant matter, in order to correct the error in the face of the indictment, the court would have to subtract as opposed to add facts. Specifically, the court would be required to remove Weisert as a conspirator thereby altering the offense (actually a non-offense) found by the grand jury. Such would constitute a blatant violation of due process and equal protection, in addition to a violation of the general right to indictment. A court may not supplant itself for the grand jury by substantively amending an indictment. In this context, the Newell Court stated:

> It is fundamental in the constitutional limitation that an indictment is not amendable by the

> court to charge an offense not found by the grand jury, either by substitution of offense or to supply substantive omissions. [152 N.J. Super. supra at 467]

As is reflected by the overt acts set forth in the indictment, the exclusive evidence proffered to the grand jury as to petitioner's liability was a conversation in which he engaged with the undercover agent. This Court must fashion a remedy for the obvious prejudice stemming from the fact that the grand jury was misinstructed that it was required to indict petitioner upon a finding that a conspiratorial agreement was struck between he and Weisert. The conduct of petitioner was wholly innocent and the indictment therefore is palpably defective and should have been dismissed by the trial court. See **United States v. Dansker, 537 F.2d 40 (3 Cir. 1976), cert. den. 429 U.S. 1038 (1977); United States v. Brown, 555 F.2d 407 (5 Cir. 1977).** The basis of the trial court's opinion is that "with proper instructions the indictment can be presented to a petit jury." That rationale bears no relationship to denial of due process and equal protection at the grand jury stage. The court ruled that the grand jury process, in effect, is a mere formality. High regard is accorded to a "defendant's valuable right

not to be held to answer for a criminal offense unless on presentment or indictment of an [independent] grand jury." **State v. Chandler, 98 N.J. Super. 241, 245 (Cty. Ct. 1967); See State v. Brown, 188 N.J. Super. 656, 671 (Law Div. 1983); Cf. State v. Weleck, 10 N.J. 355 (1952); State v. Drayton, 23 N.J.L. 49 (Sup.Ct. 1850).** Thus, an indictment is null and void where the grand jury by virtue of misinstruction has been deprived of its independence. If a prosecutor is permitted to frame the law in any fashion which he chooses, he may completely dominate the grand jury and render it a nugatory process. The sole means to avoid such prosecutorial abuse is by formulation of a rule that a tainted indictment voids a prosecution **ab initio.**

So too, we stress that if courts are permitted to amend indictments to charge offenses not found by the grand jury, the court becomes the grand jury. The grand jury herein found a conspiracy in which Weisert was the common link. Therefore, the grand jury did not charge an offense due to the prosecutor's misinstructions. No new charge may be constructed by a court or prosecutor. See, **United States v. Cryan, 490 F.Supp. 1234 (D.N.J. 1980), aff'd 636 F.2d 1211 (3 Cir. 1980). Cf. United States v. Crocker, 568 F.2d 1049,**

1059-1060 (3 Cir. 1977) (Court and prosecutor may not usurp the constitutionally guaranteed role of the grand jury); **United States v. Goldstein, 562 F.2d 526, 531 (3 Cir. 1974)** (Only grand jury may amend charges); **United States v. DeCavalcante, 440 F.2d 1266, 1271, 1272 (3 Cir. 1971)** (Indictment must remain the same one as brought by grand jury and may not become through interpretation, the indictment of the prosecutor or the court); **United States v. Silverman, 430 F.2d 106, 110 (2 Cir. 1970)** (Indictment may not be amended without re-submission to grand jury). This Court must grant certiooari to facilitate formulation of a just and fair rule.

CONCLUSION

For the foregoing reasons, we respetfully request that this Court grant certiorari.

Respectfully submitted,

ALAN DEXTER BOWMAN
ATTORNEY FOR PETITIONER

ALAN DEXTER BOWMAN

OF COUNSEL AND ON THE PETITION

MICHAEL A. QUERQUES

OF COUNSEL

APPENDIX

NOT FOR PUBLICATION WITHOUT THE APPROVAL OF THE COMMITTEE ON OPINIONS

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION

November 7, 1983

John J. Sheehy, Esq.
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Re: State of New Jersey v. John DiGilio
Docket No. SGJ-43-77-3

Gentlemen:

The defendant was indicted by State Grand Jury Indictment No. SGJ43-77-3 charging that he together with a Neil Pacilio and Anthony Pacilio, Jr, as defendants together with Robert Weisert, a state police detective acting in an undercover capacity, conspired to engage in the crime of loansharking. The indictment indicates that Weisert, pursuant to the demands or the requests of Anthony and Neil Pacilio, provided money to Anthony Pacilio to facilitate the loansharking

operation. Prior to that time Anthony Pacilio and Weisert conversed with regard to the operations to be conducted and whether or not Pacilio had "the okay" to go into the business. The "okay" was allegedly to be given by the defendant DiGilio. Thereafter, at a subsequent meeting Anthony Pacilio told Weisert that he had permission from "Johnny" (ostensibly the defendant) to go into the business and that $300 a week would have to be paid to DiGilio in order to operate.

Eventually, at the pressuring of Weisert, Pacilio arranged a meeting with DiGilio at Certo's Tailor Shop in Secaucus, New Jersey. Allegedly, at that meeting DiGilio made certain incriminating statements. Thereafter, monies were paid and still more demanded prior to the arrest of all defendants.

The defendant's first and most forceful point is his contention that the indictment must be dismissed because the Grand Jury was misinformed as to the law of conspiracy.

The indictment sets forth that,

> ANTHONY PACILIO, JR., JOHN J. DI GILIO a/k/a THE OTHER GUY and NEIL PACILIO, herein named as defendants, and Robert Weisert, a detective in the New Jersey State Police acting in an undercover capacity and using the name Bobby Hesse, between on or about the 5th

day of July, 1977 and on or about the 28th day of September, 1977...within the jurisdiction of this Court, knowingly. willfully and unlawfully did conspire, confederate and agree to engage in the business and making loans and forbearances of money at a rate of interest exceeding 50% per annum and at the equivalent rate for longer and shorter periods while not being authorized or permitted by law to do so...

It was further part of the said conspiracy that JOHN DI GILIO would permit ANTHONY PACILIO, JR., NEIL PACILIO and Det. Robert Weisert to engage in the business of making loans and charging interest at a rate exceeding 50% per annum and at the equivalent rate for longer and shorter periods;

It was further part of the said conspiracy that after the business of making loans at a rate of interest exceeding 50% per annum and at the equivalent rate for longer and shorter periods, was established and underway, JOHN DI GILIO, NEIL PACILIO, ANTHONY PACILIO, JR. and Det. Robert Weisert would divide any profits from said business among themselves.

Among the seven overt acts listed, the only one involving the defendant stated the following:

3) On or about September 6, 1977, in an automobile travelling in the town of Secaucus and in the City of Bayonne, in the County of Hudson, JOHN DI GILIO, ANTHONY PACILIO, JR., and Det. Robert Weisert did meet and have a conversation.

The indictment against defendant, Anthony Pacilio, Jr. and Neil Pacilio, was returned on March 1, 1978. Later the same month, specifically, March 29, 1978, the Appellate Division decided State v. Mazur, 158 N.J. Super. 92 (App. Div. 1978), certif. den. 78 N.J. 399 (1978) which held that an individual could not legally conspire with an undercover police operative. In Mazur, the Appellate Division followed the majority rule on the subject including State v. Collins, 120 N.J. Super. 48 (Law Div. 1972) and declined to follow State v. Lavarty, 152 N.J. Super. 413 (Law Div. 1977). Indeed, Mazur held that to instruct the jury that it could convict the defendant of conspiracy if it found that he agreed with a government informer to engage in a crime was plain error.

Defendant DiGilio remains untried by virtue of his contentions that he is physically unfit to participate in a trial. However, defendant Anthony Pacilio, Jr. and Neil Pacilio were tried by a jury , the result being that Neil Pacilio was acquitted and defendant Anthony Pacilio, Jr. was convicted. However, on appeal defendant Anthony Pacilio, Jr. argued that it was plain error for the Court to fail to instruct the jury that the defendants could not be convicted on a finding that he is, i.e., Anthony Pacilio, Jr., conspired with Det.

Weisert. The Appellate division re-affirmed State v. Mazur, supra, and decided that the plain error rule was to be invoked, thereby mandating a reversal of Anthony Pacilio, Jr.'s conviction. State v. Pacilio, __ N.J. Super. __ (App. Div. 1983) (Decided July 20, 1983), certif. den., __ N.J. __ (October 31, 1983).

Defendant argues based upon Mazur and Pacilio that the indictment in the present case is fatally defective and must be dismissed. That is, the argument is that the Grand Jury, just as the Petit Jury, was misinstructed that a defendant could be charged with conspiring with Weisert. However, I do not agree.

An analysis of Pacilio does not yield the result sought by defendant. In explaining its rationale for its finding of error by the trial court, the Appellate Division stated that,

> The trial judge failed to caution the jury that it could not convict the defendant merely on the basis of his agreement with Det. Weisert. The evidence was compounded by the fact that most of the evidence adduced during the trial related solely to conversations between the defendant [Anthony Pacilio, Jr.] and Weisert. In failing to instruct the jury that the defendant could not be convicted of conspiring with Weisert, who not only had no intention to commit the crime of loansharking but intended to frustrate the commission of such a crime, the trial judge committed the type of error which could lead to

> an unjust result and therefore constitutes plain error. (Emphasis added).

The Appellate Division in Pacilio did not dismiss the indictment but rather reversed the conviction and remanded the case back for a new trial. At no point is the conclusion reached that the indictment is fatally defective. Rather, the interpretation I draw from Pacilio is that with proper instructions the indictment could be submitted to a Petit Jury. Indeed, a reasonable jury could find that there was conspiracy between Anthony Pacilio, Jr. and defendant wherein defendant gave his "approval" to the establishment of a loansharking operation, an act which in itself would constitute a conspiracy. Therefore, the application of the defendant to dismiss the indictment on the basis asserted is denied.

The second argument submitted by defendant is that the investigative methodology utilized by the State violated the defendant's rights of due process. I find absolutely no basis in these contentions for dismissal of the indictment. Even assuming the arguments made by defendant, I find that there was not entrapment under existing law. See, e.g., State v. Talbot, 71 N.J. 160,

167-68, 176; State v. Molnar, 81 N.J. 475, 484 (1980). See also, Hampton v. United States, 425 U.S. 484 (1976).

The next contention of the defendant is that the prosecution committed rank misconduct and corrupted the Grand Jury process by procuring Grand Jury minutes respecting the testimony of Anthony Pacilio by an exparte order to enable the prosecution to prep Robert Weisert as a rebuttal witness. I see no basis in law or in fact that this be an appropriate reason for dismissal of the indictment. Moreover, reliance upon In Re 15th Essex County Grand Jury, 111 N.J. Super. 564, 568 (App. Div. 1970) is misplaced since that case does not hold that it is misconduct for a prosecutor to permit an investigating officer as a rebuttal witness to inspect Grand Jury minutes. Moreover, the holding does not even require the prosecutor to give notice when transcripts are ordered during Grand Jury proceedings and retained by the prosecutor.

The defendant argues that he should be permitted to cross-examine Det. Weisert at trial with regard to his involvement in an unrelated civil matter on the basis of his bias and interest in the outcome of this litigation. I find this application to be premature. It is more properly to be made at trial. Similarly, the

application to strike Neil Pacilio from the indictment due to his prior acquittal is a matter to be handled by the trial court at the time of trial.

The defendant further moves under R.1:12 that I disqualify myself from this case on the basis that I previously served as Prosecutor of Morris County. However, I terminated my service in that position in April, 1977, approximately one year prior to the indictment against defendant. Moreover, both the investigation and preparation of the case was by the Attorney General. In no way did my office participate to my knowledge. I see absolutely no basis upon which I cannot sit on pre-trial applications or as trial judge if I am called upon to do so.

Various miscellaneous motions are made by defendant that must be treated. First, he contends that evidence should be admitted that he suffered from a mental disease or defect so as to negate the mens rea attendant to the offense charged in the indictment. This is a matter which should properly be addressed to the trial court. This court has had absolutely no showing sufficient to decide the point. Defendant then claims that his right to a fair trial and to counsel were violated due to the seizure of certain materials by

federal agents. This matter was previously dealt with. and in any event it is unsupported by the papers attendant to this motion.

Defendant next argues that absent evidence as to the extension of a loan there is an insufficiency of evidence to support the proposition that he conspired to engage in the business of loansharking. I find that this argument has no basis in law. It is hornbook law that the crime of conspiracy is distinct from the substance of offense committed pursuant to that conspiracy. See, e.g. State v. Cormier, 46 N.J. 494, 501 (1966). Furthermore, if the State's proof is indeed accepted, there would be a basis upon which to find the crime of conspiracy although no loans in fact were committed. See, e.g., State v. Travis, 133 N.J. Super. 326, 322 (App. Div. 1975).

In summary, the applications to dismiss the indictment are all denied. The other points raised by defendant are to await presentation at the time of trial.

Very truly yours,

Donald G. Collester, Jr.
P.J.JD.R.C. t/a

DGC:jh

ORIGINAL FILED ON FEBRUARY 21, 1984

IRWIN I. KIMMELMAN
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ATTORNEY FOR PLAINTIFF
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DEPUTY ATTORNEY GENERAL
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SUPERIOR COURT OF NEW JERSEY,
MORRIS COUNTY - LAW DIVISION
INDICTMENT NO. SGJ43-77-3

Criminal Action

ORDER DENYING DEFENDANT'S PRETRIAL MOTION TO RECONSIDER DENIAL OF A MOTION TO DISMISS THE INDICTMENT.

STATE OF NEW JERSEY, :

Plaintiff, :

v. :

JOHN J. DIGILIO, et al. :

Defendants. :

This matter having been presented to the court on January 27, 1984, by Michael Querques, Esq., and Alan

D. Bowman, Esq., attorneys for defendant John J. DiGilio, and Philip B. Papier, Jr., Esq., attorney for defendant Anthony Pacilio, with Thomas J. Chirichella, Jr., Deputy Attorney General, appearing on behalf of the State of New Jersey, Irwin I. Kimmelman, Attorney General, and the court having reviewed the submitted papers and listened to the arguments of counsel;

It is on this 21st day of February 1984

ORDERED that defendants' motion for reconsideration of this court's denial of a motion to dismiss Indictment No. SGJ43-77-3 is denied for the reasons set forth in the court's oral opinion of January 27, 1984.

Donald G. Collester, Jr. P.J.F.P.

Papers Considered

x Notice of Motion
x Movant's Brief
___ Movant's Affidvits
x Answering Brief
___ Answering Affidavits
___ Cross Motion
x Movant's Reply
x Other - oral argument and post motion papers

ORDER ON MOTIONS/PETITIONS

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION
DOCKET NO. AM-633-83T5
MOTION NO. M-3020-83
BEFORE PART G

JUDGES: COLEMEN
GAULKIN
SHEBELL

STATE OF NEW JERSEY
VS
JOHN DIGILIO

MOVING PAPERS FILED MARCH 19, 1984
ANSWERING PAPERS FILED
DATE SUBMITTED TO COURT APRIL 25, 1984
DATE ARGUED
DATE DECIDED APRIL 30, 1984

ORDER

THIS MATTER HAVING BEEN DULY PRESENTED TO THE COURT, IT IS HEREBY ORDERED AS FOLLOWS:

MOTION FOR LEAVE TO APPEAL	GRANTED	DENIED	OTHER
		X	

SUPPLEMENTAL:

FOR THE COURT,

s/ J.H.C., JR.
JAMES H. COLEMAN, JR.,
J.A.D.

WITNESS, THE HONORABLE JAMES H. COLEMAN, JR., JUDGE OF PART G, SUPERIOR COURT OF NEW JERSEY, APPELLATE DIVISION, THIS 30 DAY OF APRIL, 1984.

ELIZABETH MCLAUGHLIN
CLERK OF THE APPELLATE
DIVISION

ORIGINAL FILED IN SUPREME COURT ON OCTOBER 18, 1984

SUPREME COURT OF NEW JERSEY
M-1017 SEPTEMBER TERM 1983
22,684

STATE OF NEW JERSEY, :

Plaintiff-Respondent, : ORDER

vs. :

JOHN DIGILIO, :

Defendant-Movant. :

This matter having been duly presented to the Court. it is ORDERED that the motion for reconsideration is granted; and it is further

ORDERED that the motion for leave to appeal is denied.

WITNESS, the Honorable Robert L. Clifford, Presiding Justice, at Trenton, this 16th day of October, 1984.

STEPHEN TOWNSEND, Clerk

ORIGINAL FILED DECEMBER 13, 1984

SUPREME COURT OF THE UNITED STATES

NO. A-460

JOHN DIGILIO, Petitioner

v.

NEW JERSEY

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

Upon consideration of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including January 5, 1985.

/s/ William J. Brennan, Jr.
Associate Justice of the
Supreme Court of the United States

Dated this 13th
day of December, 1984.